IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

THE MORRISDALE COAL COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Question Presented, Statutes Involved, and Statement of the Case see pages 1 to 4 of the Petition.

The United States is not entitled to recover upon a common law bond given solely for the protection of and naming as obligee only "Blakely D. McCaughn, Collector, First District, Pennsylvania."

The statute of limitations on the collection of the taxes involved herein, as extended by waiver (R. 50), ran on April 30, 1925 (R. 6, 22, 50, 63), while Collector McCaughn was still in office (R. 89, 93). Sections 250 (d) of the Revenue Acts of 1918 and 1921. That McCaughn realized this

seems obvious from his anxiety thereafter to secure an unconditional waiver which was refused (R. 45, 63, 65, 68).

It is, therefore, apparent that in 1921 and until March, 1933, the United States could have instituted suit and recovered from McCaughn, or the surety on his bond, for McCaughn's failure to use the due diligence required of him in collecting the taxes assessed against the coal company. Sections 3651, 3943, and 3950 of the Internal Revenue Code, Appendix, *infra*, pp. 12-14; *United States* v. *Kimball*, 101 U. S. 726. McCaughn, however, could then have brought suit and recovered from the coal company and the surety company on the bond they gave him. By this orderly procedure the taxes alleged to be due (or an equivalent amount) would have been collected in a proper manner despite the fact that McCaughn allowed the statute of limitations to become a bar against collection of the taxes as such.

The question here is whether the United States may wait until it is barred from suing for the taxes and from suing the collector for failing to collect the taxes and then short cut *the procedure described above by suing directly on an instrument given to the collector which has not been assigned to it* (R. 10-11, 65, 91, 94).

The evidence in the case at bar shows that the common law bond sued on was requested (R. 71) and given (R. 65) "solely" for the "personal protection" of the collector who was himself under a statutory bond to secure the faithful performance of his duties (R. 75-78, 90) and who as such collector was an entity separate and distinct from the United States. *United States* v. *Kales*, 314 U. S. 186; *United States* v. *Nunnally Investment Co.*, 316 U. S. 258.

Despite these established facts the United States, on the naked allegation that it is the real party in interest, and with no proof thereof, has prevailed below as against both the principal and the surety.

This Court should not countenance such a belated artifice.

In the past it has been generally understood that only the obligee named in a common law bond may maintain an

action upon it;[2] that the bond (as any other instrument) should—if ambiguous—be construed against the party who prepared it[3] and in the light of the negotiations between the parties and as they interpreted it;[4] and that the liability of a surety may not be extended by implication.[5]

If the foregoing principles are sound then the motion to dismiss should have been granted because: (1) the obligee named in the bond was not the United States (R. 10-11, 65); (2) the material provisions of the bond, including the designation of the obligee, were dictated by the party through whom the United States claims its interest (R. 69-70); (3) the preliminary negotiations (R. 69-72) and the failure of the obligee to assign the bond (R. 10-11, 65, 91, 94) show plainly that it was intended only for McCaughn's "personal protection"; and (4) there is no evidence tending to show that the surety agreed to be bound to anyone other than the named obligee—in fact, the single premium charged of one per cent (instead of the usual annual premium of that amount) negatives such an intention (R. 11).

In looking at the case from another viewpoint it had been considered—prior to the decision on appeal—that Rule 17(a) of the Federal Rules of Civil Procedure did not vary

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[2] *Bowers* v. *American Surety Co.*, 2 Cir., 30 F. 2d 244; *United States* v. *National Surety Corp.*, 8 Cir., 103 F. 2d 450, affirmed 309 U. S. 165; *United States* v. *New Amsterdam Cas. Co.*, S. D. N. Y., 52 F. 2d 148; *Moody* v. *Megee*, S. D. Tex., 31 F. 2d 117, affirmed 5 Cir., 41 F. 2d 515; *Howard* v. *United States*, 184 U. S. 676, 691; *Corn Belt Bank* v. *Maryland Casualty Co.*, 281 Ill. App. 387; STEARNS LAW OF SURETYSHIP, 4th ed. by Feinsinger (1934), Sections 17, 142.

[3] *United States* v. *Bayly*, 39 App. D. C. 105; STEARNS, *op cit.*, Sec. 235; 11 C. J. S. Bonds, Sec. 39.

[4] *Wilbur Trust Co.* v. *Eberts*, 10 A. 2d 397, 337 Pa. 161; STEARNS, *op. cit.*, Sec. 128; 11 C. J. S. Bonds, Sec. 40.

[5] *United States* v. *New Amsterdam Cas. Co., supra; Bowers* v. *American Surety Co., supra; United States* v. *National Surety Corp., supra; Corn Belt Bank* v. *Maryland Casualty Co., supra;* STEARNS, *op. cit.*, Secs. 17, 142; Sullivan, "Suretyship Law in Pennsylvania," 5 Temple Law Quarterly 66.

the substantive law and that the real party in interest was to be determined from the evidence before the Court.[6] The instant proceeding opens the doors under Rule 17(a) to permit anyone remotely claiming under a party to a contract to sue on such contract by merely alleging, without proof, that he is the real party in interest.

Furthermore, the decisions below appear to place a dangerous interpretation on Rule 56(c) of the Federal Rules of Civil Procedure which provides for summary judgment only where there is "no genuine issue as to any material fact". The United States in pressing its motion must, therefore, be deemed to admit that the bond was requested for and given for the "personal protection" of McCaughn (R. 65, 71). Once this fact is established it is difficult to understand the rulings of the courts below in giving judgment on the bond to the United States— a stranger to the instrument. On the other hand, if this fact is not admitted, it is difficult to accept a motion for summary judgment since there would then be a "genuine issue of a material fact".[7]

CONCLUSION.

It is, therefore, submitted that the coal company and its surety are not liable to the United States on the bond involved herein; that, in any event, the surety company is not liable to the United States on said bond; that the United States Circuit Court of Appeals for the Third Circuit erred in affirming the judgment of the District Court insofar as said judgment was in favor of the United States; and that

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[6] Moore's Federal Practice, Sec. 17.06; *Rosenblum* v. *Dingfelder*, 2 Cir., 111 F. 2d 406; Proceedings of Cleveland Institute on Federal Rules (1938), p. 257.

[7] Cf. *Toebelman* v. *Missouri-Kansas Pipe Line Co.*, 3 Cir., 130 F. 2d 1016; *Weisser* v. *Mursam Shoe Corp.*, 2 Cir., 127 F. 2d 344; *Wyant* v. *Crittenden*, 72 App. D. C. 163, 113 F. 2d. 170.

petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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August, 1943.